BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
BARTON INDUSTRIES INCORPORATED)

For Appellant: Alan R. Marks
Former President

For Respondent: Crawford H. Thomas
Chief Counsel

Benjamin F. Miller
Counsel

O P I N I O N

This appeal is made pursuant to section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Barton Industries Incorporated against proposed assessments of franchise tax in the amount of $100.00 for each of the taxable years 1965 through 1969, inclusive. In its initial brief respondent withdrew the proposed assessment for the year 1965. Accordingly, we need decide only whether appellant was subject to the franchise tax for the years 1966 through 1969, inclusive.

Appellant was incorporated in Nevada on June 6, 1961. Until appellant was dissolved on April 8, 1970, it maintained its official corporate offices in Carson City, Nevada. Apparently, this office was only nominally the corporate headquarters, for during the appeal years appellant's only business office was located in California. In 1965 and 1966, this business office was located in the San Francisco home of George A. Marks, who owned 50 percent of appellant's stock. In 1967 and all subsequent years, the office was maintained in the Berkeley home of Alan R. Marks.- Alan Marks owned the other 50 percent of appellant's stock during 1965 and 1966, but for 1967 and later years he was appellant's sole shareholder.

The corporation's principal accounting records were kept in the California office. All corporate bank accounts were maintained in San Francisco, and board of directors' meetings were always held in the California office. All of appellant's business activities were carried out and managed from appellant's California office, and it appears that appellant's employees worked exclusively in California. Despite these substantial contacts with California, appellant never qualified with the California Secretary of State to do business in California.

Appellant was engaged in two separate businesses which it conducted under different names. Using the name "Garner Laine," appellant acted as a commissioned sales representative for a number of electronics firms during 1965 and 1966. Appellant's other business was conducted under the name "Continental Business Forms" during all the years in issue. Appellant maintained telephone listings under both these names in the San Francisco telephone directory.

As Continental Business Forms, appellant solicited orders from businesses located in Northern California for personalized, custom-printed business forms. After entering into a contract with its customer, appellant would either contact out-of-state printers to obtain bids on the work or place the order directly with an out-of-state printer. Appellant did no printing itself and did not maintain a stock of goods in California or elsewhere. When appellant placed an order with a printer, it directed the printer to ship the printed forms from an out-of-state location directly to appellant's customer in California. Appellant received payment for the forms from its customer and then paid the out-of-state printer. Appellant handled all trade adjustments or account collection problems.

On several occasions appellant acted as a commissioned sales agent for California printers. In such cases the contract of sale was formed between appellant's customer and the California printer. The customer made payment directly to the printer, who then paid appellant a commission on the sale.

Since its incorporation appellant has filed California tax returns pursuant to the corporation income tax law. (Rev. & Tax. Code, §23501 et seq.) Under this law, foreign corporations not doing intrastate business in California are taxed on their net income from California sources. Unlike the corporation franchise tax law (Rev. & Tax. Code, §23151), however, the corporation income tax law

contains no minimum tax provision. Consequently, appellant did not have any corporation income tax liability during the years now in issue because each of those years was a loss year.

In 1962 respondent determined that appellant was not subject to the franchise tax imposed by section 23151 and had properly filed under section 23501. Subsequently, respondent decided that this determination was erroneous and that appellant should have been held subject to the franchise tax since the year of its incorporation. Respondent's turnabout led to proposed assessments of the minimum franchise tax for the income years 1965 through 1969. Respondent has now withdrawn the assessment for 1965 because it was based on the theory, since discarded, that appellant began doing business within California in 1965. The propriety of the other assessments depends upon whether appellant was doing intrastate business in California during the relevant years, thus subjecting it to the franchise tax for those years.

The franchise tax is imposed on "every corporation doing business within the limits of this state..., for the privilege of exercising its corporate franchises within this state. . . ." (Rev. & Tax. Code, § 23151.) "Doing business" means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit. (Rev. & Tax. Code, §23101.) Respondent contends that the facts show appellant was "doing business" within California during the appeal years,, and we tend to agree. Appellant's sole contention is that it was conducting a purely interstate business and that the imposition of a tax on the "privilege" of conducting this business is prohibited by the commerce clause of the U.S. Constitution.

Even if appellant* s contentions are correct, however, this board has a well-established policy of abstention from deciding constitutional questions in appeals involving only deficiency assessments. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; see also Appeal of Albert E. and S. Jean Hornsey, Cal. St. Bd. of Equal., June 2, 1971, and the cases therein cited.) This policy is based on the absence of any specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and we believe such review should be available for questions of constitutional importance. This policy properly applies to this appeal and disposes of the only issue raised by appellant.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Barton Industries Incorporated against proposed assessments of the minimum franchise tax in the amount of $100.00 for each of the taxable years 1965 through 1969, inclusive, be modified to reflect respondent's withdrawal of the assessment for the year 1965. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 31st day of July, 1972, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary